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BEFORE
THE ALABAMA PUBLIC SERVICE COMMISSION

IN RE: Petition For A Declaratory Order Regarding Classification Of IP Telephony Service	**DOCKET 29016**

INITIAL COMMENTS OF THE ALABAMA CABLE TELECOMMUNICATIONS ASSOCIATION

The Alabama Cable Telecommunications Association ("ACTA") respectfully submits these comments in response to the Alabama Public Service Commission's ("APSC" or "Commission") August 29, 2003 *Order* in the above-captioned proceeding.[1] ACTA commends the Commission for refraining from exercising any jurisdiction it may have with respect to voice over Internet Protocol ("VoIP"), while the Commission evaluates its role and the development of the technology through this docket.

I. INTRODUCTION AND SUMMARY.

As communications technologies continue to evolve, and industry players new and old begin to take advantage of these technologies, those charged with supervising the industry will necessarily have to reexamine traditional regulatory goals, policies and requirements in light of the new developments. ACTA represents the cable industry in Alabama, which expects over time to be a leader in the deployment of VoIP technology. ACTA, therefore, commends the Commission for recognizing the continuing evolution of VoIP communications and seeking information and analysis with respect to them.

A number of related technical developments contribute to the current prominence of VoIP as an issue. First and foremost is the continuing improvement in computer and integrated circuit technology that make it possible to convert analog voice signals into

[1] The ACTA is the trade association of Alabama's cable television operators. Its members collectively provide cable service to approximately 925,000 homes in Alabama.

digital packets and then reconvert them to analog voice signals at some distant point. Second is the enormous growth in consumer awareness and use of the Internet, the fundamental protocol of which provides the basis for VoIP functionality. Third is the growing penetration of two-way broadband Internet connectivity, not merely to businesses (who have long been able to purchase DS1 or greater capacity connections to Internet access providers), but to residential customers as well. Cable operators have led the way in bringing these innovative information services to consumers, particularly to the residential market.

All these developments create a situation in which the application of traditional assumptions about the regulation of voice telephony to this new technology become questionable. For more than a hundred years, the nation's telephone network has been optimized to provide reliable voice communications; the need for extensive data communications did not arise until the 1960s. Yet, VoIP represents the emerging triumph of data over voice: packets representing voice communications are, at bottom, just packets, making their way through the Internet and private networks along with packets representing email, web pages, video streaming, file transfer protocol downloads, peer-to-peer music exchanges, and the myriad Internet applications which end users invoke, world-wide, each day.

This does not mean that all VoIP activity is forever beyond the Commission's jurisdiction (although that is probably true today for the majority of VoIP applications). It does mean that whatever the scope of the Commission's jurisdiction over VoIP activity, any exercise of that jurisdiction must recognize that those matters within the Commission's authority are, at most, only part of the picture. As a result, and as

described more fully below, ACTA's principal recommendation in this matter is that the Commission establish a regime under which the "default rule" is to refrain from applying any traditional regulatory requirements or obligations on VoIP offerings. The Commission would then permit interested parties to request that the Commission impose particular regulatory obligations in connection with particular VoIP offerings—with the burden of showing the need for regulation placed on those parties favoring regulation. Establishing such a regime would bring needed clarity to this sometimes complex and confusing area, while simultaneously signaling that Alabama welcomes the development and deployment of new technologies to meet consumers' communications needs.

II. TYPES OF VOIP TELEPHONY OFFERINGS.

The Commission's *Order* asks commenters to discuss the various forms of VoIP, and address related jurisdictional issues and specific matters raised in the petition filed by various incumbent carriers on this topic. The term "VoIP" generally refers to any method of using IP to provide voice communications.[2] The technologies include computer-to-computer voice technologies entirely over the public Internet; technologies that make use of the bandwidth efficiencies of packetized communications but otherwise appear similar to traditional circuit-switched telephony; entirely new technologies that piggyback voice communications on broadband information services networks; and variations thereof. The business models range from giving the capability away free, to charging monthly subscription fees, and more.

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[2] NEWTON'S TELECOM DICTIONARY (17th edition) defines VoIP as a set of technologies that "enables voice, data, and video collaboration over existing IP-based LANs, WANs, and the Internet. Specifically, VoIP uses open IETF [Internet Engineering Task Force] and ITU [International Telecommunications Union] standards to move multimedia traffic over any network that uses IP."

In sum, there are many different types of VoIP arrangements. At a minimum this means that it would not be appropriate for the Commission to adopt a "one-size-fits-all" regulatory approach to this highly heterogeneous situation, even to the "phone-to-phone" VoIP services highlighted by the ILEC petitioners. Instead, as described below, ACTA submits that each specific type of VoIP arrangement needs to be assessed on its own merits. Other commenters will likely provide additional information about different types of VoIP arrangements, and ACTA reserves the right to address them in its reply comments. At least three such technologies, however, bear mention here.

First, the cable industry's research arm, CableLabs, has spent years developing the PacketCable™ architecture to enhance the capabilities of high-bandwidth information services offered using a cable system.[3] One potential application of the PacketCable™ architecture is to provide a voice communications capability. The functioning service would allow an end user to plug a normal telephone into a standard RJ-11 jack to send and receive voice communications. Those communications would be entirely in packetized format for calls within a given system and between compatible systems, and could function without interfacing with the public switched telephone network ("PSTN"). It is widely expected, however, that cable operators will provide PSTN interconnection in order to enhance the usefulness of the offering. Indeed, cable operator provision of voice communications service presents the potential for real facilities-based competition for local residential and small business services—one of the key goals of the Telecommunications Act of 1996, and one that has been slow to be realized due to the

[3] Information about CableLabs in general, and PacketCable™ architecture in particular (including the detailed technical specifications for the architecture), is available at www.cablelabs.com. More specific information about PacketCable™, including the detailed technical specifications for the entire architecture, can be found at www.packetcable.com.

economic and operational challenges of building a stand-alone competing telephone network.[4]

Even though cable operators deploying VoIP functionality will likely interconnect with the PSTN, many of the potential applications of this functionality are a far cry from traditional telephone services and other non-traditional "information service" applications will also likely be developed over time.

Entities other than cable operators are pursuing VoIP applications as well, using very different technologies. For example, a more modest—but still innovative—VoIP arrangement is that provided by firms such as Vonage (www.vonage.com). Vonage piggybacks on a pre-existing high-bandwidth connection to the Internet (such as a cable modem connection) to provide a voice communications service in which the end user subscribing to the service can select the area code to and from which calls will be treated as "local"—irrespective of the caller's physical location.[5] It appears that this service is provided using a combination of private facilities (including special VoIP phones), the public Internet, and normal telecommunications services from incumbent and/or competitive local exchange carriers.[6]

Another VoIP arrangement is illustrated by the service described by pulver.com in

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[4] The closest thing to such head-to-head competition today probably comes from wireless services, which, while still lacking some of the quality and reliability of traditional landline voice services, compensate by bringing mobility and (typically) nationwide "free" calling to the table.

[5] *See, e.g.*, Ted Hearn, "An Advantage for Vonage? VoIP Rival Rides Cable Pipe," MULTICHANNEL NEWS Vol. 24, No. 1 (Jan. 6, 2003) at 1.

[6] By contrast, the PacketCable™ architecture provides VoIP functionality to carry voice communications over a pre-existing local cable system. That traffic can then be sent on to other destinations in packet format, or, as noted above, converted to traditional PSTN format for delivery to a PSTN address.

its currently pending petition to the FCC.[7] pulver.com offers an essentially private service, open only to high-speed cable modem customers who wish to call other similarly equipped customers—with no link to the PSTN at all. More details on pulver.com's approach to VoIP arrangements can be found at its web site. *See* www.pulver.com.

ACTA suggests that the key factor in assessing these technologies, and the extent to which the Commission might exercise whatever regulatory authority it may have over them, should not be determined by the technology or routing arrangements involved. Instead, ACTA suggests a careful, fact-specific, case-by-case review of particular VoIP offerings, with a general presumption that any such services may be offered on a non-regulated basis, is the best way to preserve the vibrant technological innovation in this nascent industry.

III. APSC REGULATION WOULD BE PREMATURE IN LIGHT OF THE FACT THAT THE REGULATORY STATUS OF VOIP IS CURRENTLY BEFORE THE FCC.

The Commission's *Order* asks commenters to address particular matters raised in the ILEC Petition, including whether VoIP fits within the regulatory definition of a "transportation company" as defined by Alabama Code Section 37-2-1. "Transportation company" is defined as any person not engaged solely in interstate commerce that owns, operates, leases, manages or controls, as a common carrier or for hire, among other things, any telephone line. ALA. CODE § 37-2-1. While some forms of VoIP may use traditional "telephone lines" much like an Internet service provider, many VoIP providers do not own, operate, lease, manage or control those lines.

Moreover, ACTA's understanding is that VoIP has primarily been used to

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[7] *Pleading Cycle Established for Comments on pulver.com Petition for Declaratory Ruling*, Public Notice, 18 FCC Rcd 1894 (rel. Feb. 14, 2003).

supplement traditional circuit-switched telephony in interstate and international communications—services that clearly fall outside of the APSC's jurisdiction. Purely intrastate VoIP applications have been a very small part of the VoIP picture. Furthermore, it will become increasingly difficult to determine whether any particular service arrangement does, or does not, involve a substantial amount of purely "intrastate" calling. This is because technological developments in communications technologies have made the distance a communication might travel less and less relevant to the cost of providing it. As such, service providers increasingly make no distinction between what might be traditionally viewed as "local" services versus what might traditionally be viewed as "long distance" services.[8]

Regardless of whether VoIP providers could possibly be classified as "transportation companies" under the Alabama Code in light of some arguably intrastate activities, any attempt to immediately impose such a classification and resulting regulatory obligations would be premature in light of the fact that the regulatory classification of VoIP under federal law is currently pending before the Federal Communications Commission ("FCC"). Specifically, AT&T has requested that the FCC rule that VoIP services are not subject to exchange access charges under current law, and pulver.com has petitioned the FCC to declare VoIP not to be a telecommunications

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[8] *See, e.g., Where Have All the Numbers Gone? (Second Edition) Rescuing the North American Numbering Plan from Mismanagement and Premature Exhaust*, Economics and Technology, Inc. (June 2000) at 9 (stating that the "distance-sensitive cost per minute of network transport varies by well under a penny as between the shortest distance calls (such as to an adjacent exchange) and coast-to-coast connections. Prices charged for long-distance calls have come to reflect this new cost reality.").

service.[9] Due to the overwhelmingly interstate nature of VoIP services, the FCC will obviously play a very important role in establishing an appropriate regulatory framework for approaching VoIP. This Commission is well aware of the importance of FCC policy statements in the arena of VoIP, and has declined to address the matter on at least one occasion "because the FCC has not addressed classification of such service."[10]

The FCC, of course, was aware of the existence of VoIP and the knotty regulatory issues it creates well before the AT&T and pulver.com petitions. As far back as 1998, the FCC carefully considered issues concerning VoIP in the context of universal service issues, and the FCC chose wisely to leave these new technologies alone, refusing to classify them as "telecommunications services" for regulatory purposes.[11] The wisdom of that choice is shown by the continued growth of services based on these new and innovative technologies. That growth, in turn, has once again brought the matter before the FCC in the AT&T and pulver.com petitions. Recent press reports indicate that the FCC is contemplating opening a docket to consider VoIP regulatory issues in the very near future.[12] It is far from clear in these circumstances that this Commission should

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[9] *See Wireline Competition Bureau Seeks Comment on AT&T's Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Public Notice, 17 FCC Rcd 23556 (rel. Nov. 18, 2002); *Pleading Cycle Established for Comments on pulver.com Petition for Declaratory Ruling*, Public Notice, 18 FCC Rcd 1894 (rel. Feb. 14, 2003).

[10] *In Re Petition for Arbitration of the Interconnection Agreement between BellSouth Telecommunications, Inc., and Intermedia Communications, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Arbitration Panel Recommendation and Proposed Order Regarding Interconnection Agreement, 2001 Ala. PUC LEXIS 27 (Ala. PSC Mar. 2, 2001), *order adopted in* 2001 Ala. PUC LEXIS 26 (Ala. PSC May, 21, 2001).

[11] *See Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, ¶ 83 (1998).

[12] "VoIP Regulation—Powell Chimes In, California Pushes On," BROADBAND REPORTS, at www.broadbandreports.com/shownews/33849 (Oct. 12, 2003) (quoting FCC Chairman Powell stating that the FCC is likely to initiate this fall a proceeding to consider regulatory issues surrounding VoIP).

expend substantial resources to try to develop a state-specific regulatory policy regarding these matters when the same issue is front-and-center at the FCC.

This is particularly true given the heavily interstate nature of many VoIP arrangements. For example, the FCC has concluded as a general matter that connections to the Internet are, essentially, inherently interstate in nature. While it is conceivable that the FCC will retreat from this approach in the context of VoIP, it is at least equally likely that the FCC will conclude that VoIP arrangements are subject to interstate regulatory authority. Such a conclusion would severely limit the effectiveness of state-level activity in this sphere.[13]

In fact, a federal court recently held that federal law precludes state regulation of VoIP. Earlier this month, the U.S. District Court for Minnesota enjoined the Minnesota Public Utilities Commission ("MPUC") from regulating Vonage. The court held that Vonage's services are unregulated "information services" under Federal law.[14] Specifically, referring to the FCC's pronouncements about VoIP in a report to Congress on universal service, the court found that "Congress has expressed an intent that services like Vonage's must remain unregulated by the Communications Act" and preempted the

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[13] By the same token, the technologies used to offer VoIP services are not in any meaningful sense state-specific. This means that state-specific rules applicable to VoIP offerings have a real potential to make it difficult or even impossible for service providers to actually roll out their services. This is particularly so for arrangements where the technology is being purchased and deployed on a national basis, and for arrangements where the actual functionality is provided by means of centrally-located, rather than state-specific, equipment.

[14] *Vonage Holdings Corp. v. Minnesota Public Utilities Commission*, 2003 U.S. Dist. LEXIS 18451, *16 (D. Minn. Oct. 16, 2003) (holding that Vonage's VOIP service constitutes an information service under Section 153(20) of the Communications Act because "it offers the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications,'" citing 47 U.S.C. § 153(20)).

MPUC's actions as conflicting with federal law.[15] This ruling strongly suggests that state regulators should be reluctant to attempt to extend regulation to VoIP providers at this time, in order to avoid running afoul of federal law.

Given the largely interstate nature of the VoIP, ACTA suggests that it would be prudent for this Commission to give the FCC time to consider and act—rather than trying to fashion a state-specific response to an interstate and international issue.

IV. THE COMMISSION SHOULD PRESUMPTIVELY REFRAIN FROM IMPOSING REGULATORY REQUIREMENTS ON VOIP SERVICES.

The Commission's *Order* also asks commenters to address whether VoIP providers should generally be subject to Commission rules, including tariffing requirements and intrastate access charges obligations.

From a public policy perspective, regulators should act only when competitive forces fail to discipline the behavior of firms in the market. Traditional regulation is based on the idea that a "utility" such as a traditional incumbent carrier has a "natural monopoly," so that competitive forces cannot adequately discipline market behavior. In such cases—in the absence of regulation—consumers suffer higher prices, lower service quality, and less rapid innovation than a competitive market would deliver. With VoIP, however, the diversity of technological and business arrangements, as well as the nascent nature of the industry, means that the Commission need not presume that market forces will fail.

The best way to deal with this situation is for the Commission to forego regulation at this juncture, so as to observe whether any market failures will develop. The

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[15] *Id* at *25-27 (citing *Federal-State Joint Board on Universal Service*, Report to Congress, 13, FCC Rcd at ¶ 95).

Commission can monitor customer acceptance of VoIP services, along with customer sensitivity to price changes, to differences in service quality, and to differing technological innovations. If necessary, after considering what actually happens in the market, the Commission can step in and regulate lightly, to the minimum extent required to protect consumers.

ACTA's specific recommendation is that the Commission declare a presumption that VoIP services will not be subject to any regulatory obligations, including tariffing and intrastate access charge obligations.[16] If some party believes that some particular VoIP arrangement is within this Commission's jurisdiction and that some particular level of regulation is appropriate for that arrangement, the proponent of that view should be required to establish the factual and policy basis for such a conclusion in a public proceeding in which all interested parties may participate. This will allow the Commission to make careful, specific decisions about particular service arrangements while at the same time creating an overall regulatory environment in which Alabama consumers will receive the full benefits of new and innovative technologies.[17]

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[16] Regarding intrastate access charges, it is clear that many VoIP arrangements are information services, and would be exempt from all access charge obligations under the FCC's long-standing "ESP exemption." Should the FCC, or a court of relevant jurisdiction, hold that particular VoIP arrangements are information services under the federal Communications Act, any ruling by this Commission to impose such charges on VoIP providers would be preempted under federal law. Note, however, that even if access charges are found not to apply to VoIP under the ESP exemption, local exchange carriers ("LECs") would still receive compensation for use of their networks. VoIP providers connecting to the PSTN through a LEC's network would be treated as business customers and pay the applicable business rates (rather than paying access charges applicable to carriers).

[17] In particular, specific technical and/or service quality requirements designed for applications in the traditional, legacy-technology PSTN should not be applied to any VoIP service without careful, fact-specific consideration. For example, the PSTN supplies sufficient power to run a simple telephone, while typical VoIP telephones are powered separately (by the consumer's electric power, by a battery, or both). It would be inappropriate to apply powering requirements to VoIP technologies. This is particularly so when (a) so many PSTN customers use cordless

(note continued)...

Such a ruling would have enormously beneficial effects. It would send a clear message to the investment community that firms may enter the market here without fear of being burdened with traditional, well-intentioned, but, inevitably, burdensome and uncertain, regulatory obligations. In this regard, cable operators in particular may be well-positioned—once the equipment vendor community completes the process of rolling out gear that fully complies with the PacketCable™ specifications—to bring healthy, needed competition to the still largely-monopolized telephone markets in Alabama.

...(note continued)
phones that do not function without locally-supplied power and (b) wireless (CMRS) phones do not function without independent power. The significance to consumers of any particular departure by a VoIP arrangement from the traditional operating characteristics of the PSTN (such as network-supplied power) is something that the market, not regulators, should work out in the first instance.

V. CONCLUSION.

For the reasons stated above, ACTA respectfully suggests that the Commission should declare a presumption that it will not impose intrastate regulatory requirements on VoIP arrangements. Any party seeking to have the Commission impose any such requirements should bear a heavy burden of showing why the public interest requires that course. This will create a legal and regulatory environment in Alabama that will promote the rapid development of competitive alternatives for voice communications services, to the benefit of all citizens of the State.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William R. Chandler certify that a copy of the foregoing Initial Comments of The Alabama Cable Telecommunications Association in *In Re Petition For A Declaratory Order Regarding Classification Of IP Telephony Service* Docket 29016 was served upon the persons below by first class, U.S. mail, postage prepaid, this 31st day of October, 2003.

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